

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 10, 1997

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| RAY D. STEPHENS |) | |
| Complainant, |) | 8 U.S.C. § 1324b Proceeding |
| |) | |
| v. |) | OCAHO CASE NO. 97B00092 |
| |) | |
| SAFE KIDS INC. |) | |
| Respondent. |) | |

ORDER OF INQUIRY

PROCEDURAL HISTORY

On September 23, 1997, I issued an order to the complainant in this matter to execute service of process or to show cause why the complaint should not be dismissed because the record did not reflect that service had been adequately perfected so as to satisfy applicable rules¹ in that there was no affirmative showing that respondent was a corporate party, that Gary R. Henri (sic), to whom the complaint package had been mailed was its registered agent for service of process, or that a copy of the complaint package was actually received by anyone authorized to accept service as required by 28 C.F.R. § 68.3(1), (2), and (3). The return receipt bore the partially illegible signature of "Nancy . . . (illeg.)" and it could not be determined from the record what, if any, connection the signer had to Safe Kids.

In response, on October 14, 1997, complainant submitted exhibits A and B, being respectively a certified copy of Articles of Incorporation dated December 18, 1995 under the provisions of the Utah Revised Business Corporation Act (Utah Code Ann. § 16-10a-101 et. seq.) for Safe Kids, Inc. showing both the incorporator and the initial registered agent to be Gary R. Henrie, 376 East 400 South, Suite 300, Salt Lake City, Utah 84111, with no other officers or directors listed on the certificate, and a computer generated transcript dated September 30, 1997 showing that the corporation was found delinquent on January 1, 1997 for failure to file an annual report, that notice thereof was mailed to Gary R. Henrie at 376 E. 400 S., Ste. 300, Salt Lake City, Utah 84111, and that a certificate of dissolution was issued on January 30, 1997.

Complainant's submission further identified the signature on the return receipt card as being that of Nancy Halliday, a paralegal/secretary who handles mail for the firm Halliday and Watkins where Gary R. Henrie previously worked. It further represented that Henrie still picks up mail at this address, but that his new address is 8 East Broadway, Suite 620, Salt Lake City, Utah 84111, the same being the law offices of Lehman, Jensen, and Donahue. A duplicate

¹ Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

package was accordingly mailed to the new address on October 20, 1997. The return receipt shows delivery to that address on October 23, 1997 and it appears that service was effectuated. No answer has been made, and the time for filing an answer has expired.²

Ordinarily under these circumstances I would issue an order requiring the respondent to answer or to show cause why a default judgment should not issue. Review of the complaint, however, discloses that there may be no set of facts consistent with the allegations upon which relief can be provided in this forum. In reaching this conclusion I construe the allegations in the light most favorable to Stephens and accept the factual allegations as true.

The complaint alleges that Ray D. Stephens, a United States citizen, applied and was qualified for the job of telemarketer for Safe Kids, Inc. on June 25, 1996. He was informed by Safe Kids that it is company policy not to hire or continue to employ anyone who would not supply a social security number. Stephens was evidently hired, but states he was fired because of his citizenship status on June 26, 1996 and told that he was suspended from working (terminated) until he provided a social security number. He seeks re-hire. Stephens checked “yes” in a box on the form complaint indicating, “The Business/Employer refused to accept the documents that I presented to show I can work in the United States.” However, the words “to show I can work in the United States” are crossed out. The documents which the employer refused to accept are identified as “Statement of Citizenship” and “Affidavit of Constructive Notice.” Neither appears in the record.

The complaint also seeks back pay from June 26, 1996 and alleges that a charge was filed with Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on October 7, 1996. Attachments to the complaint include a copy of the charge and of a letter dated January 30, 1997 from OSC indicating that OSC “finds insufficient evidence to believe the charge states a cause of action under 8 U.S.C. § 1324b” and authorizing Stephens to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days. He did so.

DISCUSSION

The thrust of Stephens’ complaint is basically that Safe Kids declined to employ him as a telemarketer because he refused to provide a social security number. OCAHO case law has consistently held that an employer’s request for a social security number poses no issues under 8 U.S.C. § 1324b(a)(6). Westendorf v. Brown & Root, Inc., 3 OCAHO 477 at 811 (1992)³

² A respondent has thirty days from the date of service of a complaint in which to file an answer. 28 C.F.R. 68.9(a).

³ Citations to OCAHO precedents reprinted in Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States Volumes 1 through 5 reflect consecutive pagination within those bound volumes; pinpoint

(“[T]here is no suggestion in IRCA’s text or legislative history that an employer may not require a social security number as a precondition of employment”), Lewis v. McDonald’s Corp., 2 OCAHO 383 at 701 (1991) (“[N]othing in the logic, text, or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment”). OCAHO case law rejecting the theory that the INA imposes any obligation on an employer or prospective employer to honor the proffer of a so-called “Statement of Citizenship” and “Affidavit of Constructive Notice” and to cease withholding for federal taxes has been unanimous and unequivocal. Hamilton v. The Recorder, 7 OCAHO 968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Horst v. Juneau Sch. Dist. City and Borough of Juneau, 7 OCAHO 957 (1997); Manning v. Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D’Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Pub. Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892 (1996), aff’d sub nom. Toussaint v. OCAHO, 127 F.3d 1097 (3d Cir. 1997).

INQUIRY

Complainant is invited within fifteen days to provide an explanation of how, if at all, this case differs from the cases cited, and why it should not be dismissed. Complainant is requested also to answer the following specific questions:

Does Ray D. Stephens contend either:

1. that Safe Kids employed non-United States citizens from whose wages it did not withhold sums for federal taxes, or
2. that Safe Kids employed non-United States citizens who were not required to furnish a social security number as a condition of their employment?

citations to Volumes 1 through 5 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

SO ORDERED.

Dated and entered this 10th day of December, 1997.

Ellen K. Thomas
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 1997, I have served copies of the foregoing Order of Inquiry on the following persons at the addresses indicated.

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Office of Special Counsel for Immigration-
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